Supreme Court, U.S.
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No. 91-1950

In The

Supreme Court of the United States

October Term, 1993

AMERICAN DREDGING COMPANY,

Petitioner,

v.

WILLIAM ROBERT MILLER, SR.,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Louisiana

BRIEF OF RESPONDENT, WILLIAM ROBERT MILLER, SR.

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QUESTION PRESENTED

May the State of Louisiana constitutionally enact a statute which prohibits the assertion of *forum non conveniens* as a defense to the Jones Act claims of an American seaman injured on an American flagged vessel, plying American waters, while employed by an American corporation, which claims are brought in Louisiana state court pursuant to the savings to suitors clause?

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STATEMENT OF THE CASE

William Robert Miller, Sr., a United States citizen, worked as a merchant seaman for the majority of his adult life. For a substantial portion of his career as a seaman, Miller was a resident of the State of Louisiana. While a resident of the State of Louisiana, Miller was employed by several maritime companies operating out of Louisiana and other coastal areas of the Gulf of Mexico. In the early 1980's, Miller moved down the coast to the State of Mississippi, to a small town about an hour's drive from New Orleans, Louisiana, and continued his maritime employment. However, when there was a significant downturn in the offshore oil & gas exploration and production industry in the Gulf of Mexico region, Miller had to seek employment elsewhere. In August of 1987, Miller, a United States Coast Guard licensed vessel master (500 ton license), obtained employment with American Dredging Company through the Union of Operating Engineers, Local 25, located in Philadelphia, Pennsylvania.

Miller was employed by American Dredging Company as the master of M/V JOHN R, a tug operating in the Delaware River. While employed as the master of M/V JOHN R, Miller maintained his family's residence in Mississippi for his three minor children. During one of his hitches, Miller was injured on 12 December 1987 while aboard M/V JOHN R in the Delaware River. Miller was admitted to the Sacred Heart Medical Center in Chester, Pennsylvania on 13 December 1987, and he remained in that hospital until 23 December 1987. After his release from that facility he was treated at the Hospital for Joint Diseases Orthopaedic Institute in New York,

and, once he was able, he returned to his home on the Gulf Coast in Mississippi. Since February of 1988, Miller has been under the care of Dr. Chris Wiggins in Pascagoula, Mississippi, as well as various other physicians in the Gulf Coast area. Miller is still under the active care of his physicians along the Gulf Coast.

Miller retained local counsel and suit was filed against American Dredging Company on 1 December 1989 in the Civil District Court for the Parish of Orleans, State of Louisiana, as American Dredging Company's registered agent for service of process was located in New Orleans. The lawsuit was served upon that agent on 19 December 1989, and, as American Dredging Company was a member of the American Steamship Owners Mutual Protection & Indemnity Association, the P & I Club appointed local defense counsel to appear and defend the interests of American Dredging Company and respective underwriters.[1]

After the defendant made its appearance in the case, plaintiff served substantive written discovery upon the defendant, and defendant provided responses to these

[1] In this regard, it is quite noteworthy that the P & I Club maintains an approved list of defense attorneys, marine surveyors and other experts in various locations around the world, to defend the interests of American Dredging Company and the other Club members. Consequently, the defense of ADC's interests in this case, by the P & I Club, will not impose any hardship upon ADC.

interrogatories and requests for production of documents. Next, American Dredging Company deposed Miller, and after all of this discovery was conducted[2], ADC moved for a dismissal on the basis of lack of *in personam* jurisdiction. However, given its substantial contacts with the State of Louisiana, including the recent performance of a five million dollar dredging contract in the state,[3] the trial court specifically found that ADC's contacts with the State of Louisiana were sufficient to establish personal jurisdiction over the defendant, and the court denied ADC's motion in that regard. However, ADC also filed a motion to dismiss on the basis of *forum non conveniens*, and the trial judge granted that motion, contrary to Article 123 C of the Louisiana Code of Civil Procedure and clear precedent of the Louisiana Supreme Court. *Markzannes v. Bermuda Star Line, Inc.*, 545 So. 2d 537 (La. 1989), *cert. denied*, 493 U.S. 1043 (1990).

As this *forum non conveniens* dismissal of the case of an American Jones Act seaman, injured on an American flagged vessel while working for an American company in American waters was unprecedented, Miller appealed to the Louisiana Fourth Circuit Court of Appeals.[4] However, that court simply affirmed the lower court's ruling,

[2] Under Article 7 of the Louisiana Code of Civil Procedure, this activity of the defendant constitutes a general appearance.

[3] Joint appendix at page 33.

[4] On the other hand, ADC did not appeal the court's finding that it was subject to the jurisdiction of the Louisiana courts. Consequently, that issue is not before the court and this conclusively demonstrates that ADC has not been haled into the Louisiana forum in violation of any constitutionally protected rights. ADC simply contends that, while it is constitutionally permissible for it to litigate in Louisiana, as it has done sixteen

so resort was had to the Supreme Court of the State of Louisiana. Recognizing that the *forum non conveniens* dismissal of this American Jones Act seaman's claim was unprecedented in the American jurisprudence, and was also proscribed by Article 123 C of the Louisiana Code of Civil Procedure and prior Louisiana Supreme Court holdings, the Louisiana Supreme Court reversed and remanded for trial. *Miller v. American Dredging Co.*, 595 So. 2d 615 (La. 1992). After the reversal, ADC sought *certiorari* from this Court; *certiorari* was granted on 19 April 1993.[5]

SUMMARY OF THE ARGUMENT

It would be unprecedented in the American jurisprudence for this court to allow the *forum non conveniens* dismissal of a Jones Act suit brought by an American seaman for injuries sustained aboard an American flagged vessel plying the inland waters of the United States. The defendant has not been able to cite a single such case to this Court. Where the Jones Act applies to the claim of an American seaman, especially with respect to a domestic casualty, *forum non conveniens* is not to be considered

times before this claim, the Louisiana forum is merely "inconvenient". It is interesting that ADC did not find the forum inconvenient on the four previous occasions in which it was a plaintiff in Louisiana courts, Joint Appendix at 36, 43-44, nor did it seek *forum non conveniens* dismissals the ten other times that it was a defendant in a Louisiana court.

[5] 113 S.Ct. 1840 (1993).

as a result of the application of the Jones Act and American law.[6] While there may be a split in the circuits with respect to possible *forum non conveniens* dismissals of the claims of foreign seamen, or with respect to casualties occurring in foreign waters, there is absolutely no support for the application of this doctrine to a domestic casualty involving an American flagged vessel, an American employer and an American Jones Act seaman.

The doctrine of *forum non conveniens* is not a fundamental feature of the general maritime law, nor is it subject to constitutional protection. The constitutional protection afforded to American Dredging Company (just like any other defendant in the United States), against litigation in a forum which would "offend traditional notions of fair play and substantial justice"[7], is contained

[6] American Dredging Company has admitted in its brief that the Jones Act and United States law applies in the case *sub judice*. Brief of petitioner, p. 17, n. 5: "The choice of law question is not an issue in this case". Consequently, the sole issue in this regard is whether the *per se* rule of the Ninth, Tenth and Eleventh Circuits, or the standard of the Second and Fifth Circuits, is correct. *Compare Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1487 (9th Cir. 1987), *modified*, 861 F.2d 565 (9th Cir.), *cert. denied sub nom., Crowley Maritime Corp. v. Zipfel*, 486 U.S. 1054 (1988); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481 (10th Cir. 1983); *Szumlicz v. Norwegian American Lines, Inc.*, 698 F.2d 1192 (11th Cir. 1983); *La Seguridad v. Transytur Line*, 707 F.2d 1304 (11th Cir. 1983), *with Cruz v. Maritime Co. of Philippines*, 702 F.2d 47 (2d Cir. 1983) and *In re Air Crash Disaster near New Orleans, La.*, 821 F.2d 1147, 1163 n.25 (5th Cir. 1987) (en banc), *vacated sub nom., Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), *reinstated*, 883 F.2d 17 (5th Cir. 1989).

[7] *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

in the Due Process Clause of the Fifth Amendment to the United States Constitution. Before a court may exercise its judicial jurisdiction over a party, the court must find that the defendant has sufficient "minimum contacts"[8] with the forum to make the exercise of that jurisdiction fair and constitutionally permissible. This is a constitutional protection which attatches to every defendant in all American courts. On the other hand, *forum non conveniens* is merely a discretionary doctrine which is recognized in some jurisdictions, and not recognized in others. Additionally, even in the jurisdictions in which some form of *forum non conveniens* may be recognized, it is not applicable in all types of cases. As this doctrine is not afforded constitutional status, courts in the various States, in accordance with the precepts of federalism, are free to accept or reject this doctrine as they deem appropriate.

The Legislature of the State of Louisiana's enactment of Article 123 C of the Louisiana Code of Civil Procedure does not transgress any constitutionally protected right of American Dredging Company. American Dredging Company's constitutional objections to litigating in Louisiana were the subject of a full hearing in the district court; this was resolved adverse to ADC and it chose not to appeal.[9]

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[8] *Id.*

[9] Which is not surprising, in light of the fact that this was ADC's **seventeenth** trip to a Louisiana courthouse, with at least four of those actions being instituted by ADC. Joint appendix at 33-34, 43-44.

The "savings to suitors" clause, currently codified at 28 U.S.C. § 1333(1), has favored state courts with concurrent jurisdiction over maritime claims for over two centuries.[10] State courts have always been free to adjudicate maritime disputes[11], and the States are free to adjudicate these disputes in any fashion that does not contravene an Act of Congress or otherwise runs afoul of Constitutionally mandated protections. As has been recognized in federal diversity cases, federal courts are not *Erie*-bound to apply state *forum non conveniens* law – this is because one of the primary purposes of *forum non conveniens* is to allow a court to use this doctrine as a discretionary docket management device.[12] The same rule also applies to maritime cases brought in state courts – "reverse-*Erie*" does not require state courts to apply federal *forum non conveniens* law – the states are free to apply their own

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[10] The "savings to suitors" clause was first enacted in Section 9 of the Judiciary Act of 1789. *See Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1484 n.5 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 467 (1992).

[11] *See* Woodhouse, *Powell v. Offshore Navigation, Inc.: Jurisdiction Over Maritime Claims and the Right to Trial by Jury*, 82 Colum. L. Rev. 784 (1982).

[12] *In re Air Crash Disaster near New Orleans, La.*, 821 F.2d at 1159; *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985).

version of *forum non conveniens*, if any at all.[13] To argue otherwise clearly flies in the face of federalism.[14] Furthermore, the United States Supreme Court has previously ruled that the States are free to apply their own versions of *forum non conveniens*, if any, in proceedings brought in state courts.[15]

The "desire to achieve uniformity in the exercise of the maritime law" has been greatly overstated by the petitioner. In fact, a close examination of the current maritime law indicates that this rallying cry is a non-sequitur. For example, in the field of marine insurance, one which is far more international than application of

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[13] As noted in many federal decisions, *forum non conveniens* is a procedural law, and consequently, if a federal court has jurisdiction over a case, that court should apply its own *forum non conveniens* law. *In re Air Crash Disaster near New Orleans*, 821 F.2d at 1159; *Sibaja v. Dow Chemical Co.*, 757 F.2d at 1219 (1985). Federal courts apply federal procedural law, *Hanna v. Plumer*, 380 U.S. 460 (1965), and state courts apply state procedural law. Consequently, Louisiana's state courts must apply their own procedural *forum non conveniens* law to cases resolved by those tribunals.

[14] In her dissent in *Garcia v. San Antonio Metro. Transit Auth.*, Justice O'Connor noted that "The true essence of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme". 469 U.S. 528, 581 (1984) (O'Connor, J., dissenting) (emphasis in original). One of Louisiana's interests, as a state, is the management of the dockets of its courts, and a determination of which cases it will accept for adjudication. If federalism is to be more than an empty promise, the decision of the State of Louisiana, in enacting Article 123 C of the Louisiana Code of Civil Procedure, must be respected as an appropriate exercise of her State's rights.

[15] *Missouri v. Mayfield*, 340 U.S. 1, 3 (1950).

the Jones Act, there is virtually no uniformity, as this very court has stated that matters of marine insurance are the province of the States.[16] In a very recent case, the United States Fifth Circuit Court of Appeals affirmed application of Missouri insurance law to the sinking of T/B OCEAN TRANSPORTER in the Atlantic Ocean off the coast of South Carolina. Although counsel for underwriters sought application of the general maritime law, under the flag of "uniformity in the exercise of the maritime law", the court applied the state rule instead.[17] Other cases have recently reaffirmed that it is the state's province to create rules with respect to marine insurance issues.[18]

Maritime actors must also deal with the various rules of law with respect to *in rem* rights which may or may not exist in different states.[19] Shipowners are also subject to various local dock tariffs, simply by berthing their vessels.[20] Also, within the admiralty, courts often choose to apply state laws with respect to the rate of

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[16] *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

[17] *See 5801 Associates, Ltd. v. Continental Ins. Co.*, 983 F.2d 662 (5th Cir. 1993).

[18] *Taylor v. Lloyd's Underwriters of London*, 972 F.2d 666 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1366 (1993).

[19] *See Equilease Corp. v. M/V SAMPSON*, 793 F.2d 598, 600-01 (5th Cir.) (en banc), *cert. denied sub nom., Fred S. James & Co. of Texas, Inc. v. Equilease Corp.*, 479 U.S. 984 (1986)(recognizing Louisiana state maritime lien, although not asserted timely).

[20] *Atlantic & Gulf Stevedores, Inc. v. Alter Co.*, 617 F.2d 397, 401 n.16 (5th Cir. 1970).

prejudgment interest, rather than a uniform federal rate.[21]

Finally, as this is a Jones Act[22] claim, which expressly incorporates and adopts FELA[23], *forum non conveniens* cannot be applied to this Jones Act claim as the United States Supreme Court has twice ruled that *forum non conveniens* is not available as a defense to a FELA claim.[24] And, as recently noted by this court in a Jones Act case, where there is an established judicial rule attendant to FELA, the courts are not free to contravene that rule via manipulation of the general maritime law.[25] Consequently, this Court is bound by the principle of *stare decisis* to stay its course and apply the FELA rule set forth in *Gilbert* and *Kepner*.[26]

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[21] *Zim Israel Navigational Co. v. Special Carriers, Inc.*, 800 F.2d 1392, 1394-95 (5th Cir. 1986) (state law rate applied); *Trans Orient Navigators Co. v. M/S SOUTH WIND*, 788 F.2d 288, 293 (5th Cir. 1986) (same).

[22] 46 U.S.C. § 688.

[23] The Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*

[24] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 505 (1947)(" . . . in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens.*"); *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44, 54 (1941).

[25] *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32-33, 36 (1990) (holding that the general maritime law must yield to any conflict between that body of law and the United States Supreme Court's interpretation of FELA, as applied to the Jones Act).

[26] An excellent discussion of this rule is set forth by the Ninth Circuit in *Zipfel*, 832 F.2d at 1487. *See also, La Seguridad v. Transytur Line*, 707 F.2d at 1310, n.10; *Dalla v. Atlas Maritime Co.*, 562 F.Supp. 752, 757 (C.D. Cal. 1983), *aff'd*, 771 F.2d 1277 (9th Cir. 1985).

ARGUMENT

An American Jones Act Seaman's choice of an American Forum should not be disturbed

The most outstanding features of this litigation are the following:

(1) William Robert Miller, Sr. is an American resident and citizen;

(2) It is undisputed that the Jones Act applies to this controversy;

(3) The casualty occurred aboard M/V JOHN R, an American flagged vessel;

(4) M/V JOHN R was sailing American inland waters at the time of the casualty;

(5) The defendant, American Dredging Company, is an American corporation; and

(6) American Dredging Company was a litigant in Louisiana courts on sixteen occasions prior to this dispute, including several cases in which American Dredging Company was the plaintiff in the very same Lousisiana courts to which it now objects.

These facts indicate that Miller should be afforded his forum of choice for the resolution of his Jones Act claims, subject only to the amenability of American Dredging Company to *in personam* jurisdiction.

The majority view of the courts in this country is that, where the Jones Act applies, *forum non conveniens* is not available as a defense.[27] This rule applies *a fortiori*

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[27] *See, e.g., Zipfel v. Halliburton Co.*, 832 F.2d at 1487.

where the casualty occurs in the United States.[28] With respect to the position taken by ADC, a close analysis of their authority indicates that they have not a single holding to the contrary. For example, in *Cruz v. Maritime Co. of Phillippines, supra*, the court concluded that the Jones Act did **not** apply, so any statement of a contrary rule embraced by ADC is merely *obiter dicta*.[29] Similarly, the Fifth Circuit's inexplicable retreat from the majority rule is also *dicta* as respects Jones Act claims, as *In re Air Crash Disaster near New Orleans, La.* was merely a state law diversity case. Consequently, ADC is without citation to a single relevant decision to support its contentions.

Another rule of law which must be highlighted here is that there is "a strong presumption in favor of the plaintiff's choice of forum". *Piper Aircraft Company v. Reyno*, 454 U.S. 235, 255 (1981). This rule is to be applied with even greater force in the case of a local plaintiff.[30] As Miller was a long time resident of the State of Louisiana, and as he is still certainly classified as a "local plaintiff" (given the fact that his current residence in Mississippi is within the subpeona power of the federal courthouse in New Orleans, Louisiana), the courts should not disturb Miller's choice of forum, which is convenient to him.[31]

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[28] *Id.* Zipfel was injured in Indonesia; Miller was injured on the Delaware River.

[29] *See* Edelman, *Forum Non Conveniens: Its Application in Admiralty Law*, 15 J. of Maritime Law and Commerce 517, 530 (1984); *Zipfel v. Halliburton Co.*, 832 F.2d at 1486-87.

[30] *Id.* at 255-56.

[31] In this regard, it is quite noteworthy that Miller is currently considered to be totally disabled, and his spinal injury makes traveling long distances quite painful. Consequently, it would work a tremendous hardship upon Miller if the court were to require him to litigate in Philadelphia, as opposed to his home area of the Gulf Coast.

***Forum non conveniens* – Not fundamental, Not Constitutional, and preempted!**

ADC contends that the *forum non conveniens* doctrine is a "fundamental feature" of the general maritime law and that once this status is bestowed upon the doctrine, it is entitled to "constitutional" protection.[32] However, ADC fails to cite a single provision in the United States Constitution which cloaks the judicially created discretionary doctrine of *forum non conveniens* with constitutional protection. The only constitutional issues extant were already resolved adverse to ADC when the trial court expressly found that its exercise of *in personam* jurisdiction over ADC was constitutionally proper. Although ADC attempts to elevate *forum non conveniens* to constitutionally protected status, there is no authority to support such an ascension[33], as is painfully obvious from the complete absence of citation to a single section of the Constitution from which this purported status is claimed to emanate.[34]

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[32] Brief of petitioner, p. 7.

[33] As has been noted by Justice Scalia, the Court should not create Constitutional rights where none exist. *County of Riverside v. McGlaughlin*, 111 S.Ct. 1661, 1671 (1991) (Scalia, J., dissenting) (Noting that the Court's Constitutional jurisprudence "alternately creates rights that the Constitution does not contain and denies rights that it does").

[34] In fact, the commentators agree that the *forum non conveniens* doctrine is so internally inconsistent and varies so much in its application that it is not an appropriate doctrine to be applied via any *quasi*-preemption analysis. *See* Robertson and

With respect to ADC's assertions that *forum non conveniens* is a fundamental feature of the American admiralty law, it is quite noteworthy that not a single one of the United States Supreme Court decisions relied upon by ADC survives scrutiny in this regard. First, the modern cases upon which they rely, *Piper* and *Gilbert*, are both non-maritime cases – clearly these decisions cannot stand for the proposition that *forum non conveniens* is a "fundamental feature" of the general maritime law. Second, the trilogy of old maritime cases upon which ADC relies all involve disputes among foreigners, which brings comity[35] into play. For example, *Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240 (1804), involved the salvage of a French ship by British interests on the high seas. *The Belgenland*, 114 U.S. 355 (1885), involved a high seas collision between Norwegian and Belgian vessels; and *Canada Malting Co. v. Paterson S.S. Ltd.*, 285 U.S. 413 (1932), involved both a foreign plaintiff and foreign defendant. Certainly, these cases are no authority for the propostion that an American seaman should not be able to bring his suit in an American court.[36]

Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 Tex. L. Rev. 937, 970-73 (1990).

[35] Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L. Q. 12, 31-32 (1949).

[36] It is quite noteworthy that, even in *The Belgenland*, the Court refused to dismiss the case.

ADC charges forward in its quest for constitutional status for this doctrine under the flag of uniformity. However, "uniformity in the application of the general maritime law" is nothing other than a stated policy goal of *amicus* for the petitioner, the Maritime Law Association of the United States; it is certainly not constitutionally mandated, nor does it ring true in practice. As demonstrated previously in this brief, the admiralty is rife with instances where procedural and substantive matters vary according to state statutes or local customs and usages — this is to be expected in the shipping industry, a far flung enterprise. State laws are applied in the admiralty with respect to marine insurance, tariffs, *in rem* privileges, prejudgment interest and the right to a judge or jury trial. The doctrine of *forum non conveniens* is certainly no more important than the right to a jury trial, but the federal courts have already affirmed the States' rights to disregard the Seventh Amendment[37], including Louisiana's modification of judge/jury trial procedure in maritime matters tried in Louisiana's state courts.[38]

The precepts of federalism, when combined with the concurrent grant of maritime jurisdiction to the States by the "savings to suitors" clause, necessarily entails favoring the States with a certain amount of autonomy with respect to the adjudication of maritime claims. This is especially important with respect to procedural matters, such as discretionary determinations as to which cases the States will or will not hear in their courts. In fact, this

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[37] *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d at 1491; *Minneapolis & S.L. R.R. Co. v. Bombolis*, 241 U.S. 211, 216 (1916).

[38] *Linton v. Great Lakes Dredge & Dock Co., supra.*

was the exact position taken by the United States Supreme Court over four decades ago in *Missouri v. Mayfield*, 340 U.S. at 3. There, the Court held that, in a personal injury claim brought in state court, even one involving a federal cause of action, it was up to the state to apply its own *forum non conveniens* rule, if any at all. *Id.* This indicates that the Court should not disturb this choice of the citizens of the State of Louisiana.

Louisiana's enactment of Article 123 C of the Louisiana Code of Civil Procedure indicates a conscious decision on the part of its citizenry to afford Jones Act litigants their day in Louisiana's courts — how can this be constitutionally prohibited? It is not.[39] This is an appropriate exercise of States' rights under the Tenth Amendment[40], and it is consistent with the States' freedom of choice[41] in the judicial administration of such matters.[42]

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[39] In making this decision, the "public interest factors", *Piper Aircraft Company v. Reyno*, 454 U.S. at 241 n.6, of the federal *forum non conveniens* inquiry are removed from the calculus, as the citizens of the State of Louisiana have already said "yes" to these suits.

[40] The promise of States' rights under the Tenth Amendment has been fulfilled by this Court via recognition of the doctrine of federalism. *New York v. United States*, 112 S.Ct. 2408, 2418 (1992).

[41] *Missouri v. Mayfield*, 340 U.S. at 3.

[42] In *Linton v. Great Lakes Dredge & Dock Co.*, the federal Fifth Circuit expressly noted that the Louisiana legislature was free to modify admiralty judge or jury trial procedures without running afoul of any Constitutional mandate. 964 F.2d at 1491. This clearly illustrates that the decision of Louisiana not to apply *forum non conveniens*, a common law doctrine which is foreign to its civilian courts, *Fox v. Board of Supervisors of Louisiana State Univ.*, 576 So. 2d 978, 990-91 (La. 1991), is an appropriate and constitutionally permissible choice.

Preemption of forum non conveniens by FELA and the Jones Act

The United States Supreme Court has repeatedly held that all of the rights and remedies inuring to the benefit of railway workers, as set forth in FELA and its interpretive jurisprudence, apply to Jones Act seamen by virtue of that act's[43] express terms.[44] Consequently, all of the jurisprudentially created rules which are corollary to FELA also apply to Jones Act claims. In fact, this was the basis for this Court's decision only three years ago in *Miles v. Apex Marine Corp., supra*. In *Miles* the Court noted that, as the Jones Act must remain faithful to prior judicial interpretations of FELA, the general maritime law must yield to any conflict between it and the FELA jurisprudence.[45] When this preemption analysis is focused upon the case *sub judice*, it is quite clear that the general maritime law's *forum non conveniens* jurisprudence must yield to the FELA rule which indicates that *forum non conveniens* may **not** be asserted as a defense:

> " . . . in cases under the Federal Employers' Liability Act we have held that plaintiff's choice

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[43] 46 U.S.C. § 688.

[44] *Kernan v. American Dredging Co.*, 355 U.S. 426, 431 (1958); *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107, 110 (1959); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957).

[45] *See Miles v. Apex Marine Corp.*, 498 U.S. at 32-33, 36, citing the FELA case of *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59 (1913), for the proposition that the general maritime law could not contravene the Court's prior pronouncements under FELA.

> of a forum cannot be defeated on the basis of *forum non conveniens*".

Gulf Oil Corp. v. Gilbert, 330 U.S. at 505. If this Court is to show any allegiance to *Miles*, it must hold that *forum non conveniens* may not be considered as a defense to a Jones Act claim.[46] The Court made its position very clear in *Miles*:

> The Jones Act/FELA survival provision limits recovery to losses suffered during the decedent's lifetime. See 45 U.S.C. Section 59. This was the established rule under FELA when Congress passed the Jones Act, incorporating FELA, . . . and it is the rule under the Jones Act.[47]

Consequently, there is no doubt that FELA precludes application of *forum non conveniens* to Miller's Jones Act suit.[48]

CONCLUSION

The Jones Act is remedial legislation which is intended to protect and benefit injured seamen.[49] The

[46] *Zipfel v. Halliburton Co.*, 832 F.2d at 1487; *See also Panama R. Co. v. Johnson*, 264 U.S. 375 (1924)(noting broad venue policy inherent in the Jones Act).

[47] *Miles v. Apex Marine Corp.*, 498 U.S. at 36.

[48] The FELA rule is quite clear — *forum non conveniens* may not be applied. *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 505.

[49] *Allen v. Seacoast Products, Inc.*, 623 F.2d 355 (5th Cir. 1980) (Jones Act); *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329 (1958) (FELA).

State of Louisiana has merely furthered that goal by enacting Article 123 C of the Louisiana Code of Civil Procedure which provides that injured seamen are free to file their Jones Act claims in the courts of the State of Louisiana without having to contend with arduous pretrial claims of *forum non conveniens*.[50] The vast majority of federal courts which have considered the threshold question of whether or not *forum non conveniens* may be asserted as a defense to the Jones Act claims of American seamen have held that this defense is not available. Not a single reported decision has applied this doctrine to the detriment of an American seaman involved in a casualty in United States waters on an American flagged vessel.

The Federal Employers' Liability Act, the predecessor of the Jones Act, expressly prohibits the assertion of *forum non conveniens* as a defense.[51] If this Court is to remain true to its teachings in *Gilbert*, *Kepner*, and *Miles*, it must hold that *forum non conveniens* has no place in Jones Act litigation, especially with respect to claims brought by Americans like William Robert Miller, Sr. Louisiana has made that decision with respect to the operation of its courts, and the precepts of federalism[52] require that this

[50] The doctrine of *forum non conveniens* has been referred to not as a matter of convenience, but rather, a "connivance to avoid corporate accountability". *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674, 680 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991) (Doggett, J., concurring).

[51] *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 505.

[52] " . . . forcing state courts to follow federal forum non conveniens law is fundamentally inconsistent with general but deeply held tenets of federalism". Robertson and Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 Tex. L. Rev. at 975.

Court recognize that right of Louisiana as a co-equal sovereign.

RELIEF SOUGHT

William Robert Miller, Sr. respectfully prays that this Honorable Court affirm the decision of the Supreme Court of Louisiana, and remand this matter for trial to the district court.

Respectfully submitted,

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